MOHAMAD KHALID FARZALUR RAHAMAN & ANOR *a*

v.

CITIBANK BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR *b*
RK NATHAN J
[ORIGINATING MOTION NO: S2-21-151-1999]
14 FEBRUARY 2000

LAND LAW: *Charge - Notice of default - Time period of breach specified in notice - Whether parties may agree to a time period shorter than that provided in statute - Whether in accordance with s. 254 National Land Code 1965 - Whether order for sale should be set aside* *c*

The applicants are the joint registered owners of the said property. On 6 October 1999, the Land Administrator made an order for the sale of the said property by public auction. The applicants contended that the order for sale ought to be set aside because the chargee had not complied with the requirements of s. 254 of the National Land Code 1965 ('the NLC') in respect of the statutory notice. The chargee's statutory notice as represented by Form 16D had specified seven days as the period of breach. Considering that s. 254 of the NLC stipulates that the period of breach ought to have been continued for a period of at least one month or such alternative period as may be specified in the charge, the issue was whether a seven-day period would have complied with the section. *d* *e*

Held: *f*

[1] The alternative period that may be specified in the charge by the chargee bank must be greater than one month. It makes no sense for Parliament to specifically spell out that the period of breach ought to be for a period of at least one month, and then on the other hand allow the chargee bank to arrogate to itself the right to abrogate the intention of Parliament by arbitrarily specifying a period shorter than one month. *g*

[2] The further period of time is given solely to enable the chargor a further opportunity to sort out his affairs and to look for an opportunity for a refinance of the loan. The longer the time that is given to the chargor the better is his opportunity to protect his property from foreclosure. It does not make sense therefore to hold that because parties are free to contract to include a period other than the one month as stated in s. 254(1) of the NLC it ought to mean that the chargee can stipulate a period of time shorter than one month. *h* *i*

[Order for sale set aside.]

Case(s) referred to:
Chong Kon Yon v. MBf Finance Bhd [1997] 1 CLJ 7 ***(foll)***
Citibank NA v. Jong Tze Khiok & Anor [1993] 4 CLJ 325 ***(dist)***
Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274 ***(refd)***
Lim Phin Khian v. Kho Su Ming [1996] 1 CLJ 529 ***(refd)***
Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd [1988] 1 CLJ 8 ***(refd)***
Soon Kong Meng & Anor v. Lee Thye & Ors [1995] 4 CLJ 547 ***(refd)***

Legislation referred to:
Federal Constitution, art. 3(1)
National Land Code 1965, ss. 254(1), 255, 257, Forms 16D, 16E
Sarawak Land Code, s. 148(1), (2), (3)

For the applicants - K Periasamy; M/s Periasamy & Co
For the 1st respondent - Robin Lim; M/s Azhar & Wong
For the 2nd respondent - John O'Hara

Reported by Mariette Peters-Goh

JUDGMENT

RK Nathan J:

Facts

The applicants herein are the joint registered owners of all that piece of property held under Title No. H.S.(M) 216 P.T. No. 10360 Mukim of Batu, District of Kuala Lumpur (the said property), which has been charged to Citibank Berhad on 13 June 1996. On 6 October 1999 the Land Administrator, District of Kuala Lumpur, made an order for sale of the said property by public auction.

The Application

The applicants then applied for the following orders:

(i) A declaration that the order for sale made by the Land Administrator of Kuala Lumpur on 6 October 1999 in respect of the said property be held null and void and of no effect and thus ought to be set aside; or alternatively,

(ii) that the public auction to be held be stayed until the final deposal of this application.

(iii) Costs and such other relief as the court deems fit and proper.

Findings Of The Court

The applicants contended that the order for sale ought to be set aside because the chargee had not complied with the requirements of s. 254 of the National Land Code 1965 (the NLC) in respect of the statutory notice.

The Statutory Notice

It is important for the consideration of the applicants' arguments that the statutory notice as required under Form 16D pursuant to s. 254 of the NLC be reproduced:

KANUN TANAH NEGARA
BORANG 16D
(SEKSYEN 254)

NOTIS KEMUNGKIRAN BERKENAAN DENGAN GADAIAN

Kepada:

Mohamad Khalid bin Farzalur
No. 4, Jalan Seludang,
Kampong Pasir, Segambut,
51200 Kuala Lumpur.

Noraini binti Rahmat
No. 4, Jalan Seludang,
Kampong Pasir, Segambut,
51200 Kuala Lumpur.

Penggadai dalam Gadaian yang tersebut di dalam Jadual di bawah ini bagi tanah yang tersebut di dalamnya.

Bahawasanya tuan/puan telah melanggar/memungkir peruntukan-peruntukan Gadaian ini dengan gagal membayar secara sepenuhnya jumlah yang dinyatakan di dalam surat tuntutan kami yang bertarikh 7.1.99:-

Kemudahan No.	–	70102000632580 & 70186000660409
Amaun yang terhutang setakat 99.99.99	–	RM306,327.51
Faedah	–	Pada kadar 10.05% setahun dikira ke atas jumlah prinsipal RM279,716.86 dan 20,260.18 dari 20.12.98 secara harian di mana kadar faedah ini adalah boleh berubah tertakluk kepada budibicara Pemegang Gadaian.

Dan bahawasanya kemungkiran ini telah berlanjutan selama tempoh sekurang-kurangnya tujuh (7) hari sebelum dari tarikh notis ini.

Kami sebagai Pemegang Gadaian, menurut kuasa yang diberi di bawah Seksyen 254, Kanun Tanah Negara, dengan ini mengkehendaki tuan/puan supaya memulihkan peruntukan yang dimungkirkan itu dalam tempoh TUJUH (7) HARI dari tarikh notis ini disampaikan.

Dan seterusnya adalah diberi notis jika tuan/puan tidak memulihkan peruntukan yang dimungkirkan dalam masa tempoh tersebut, maka kami akan memohon supaya perintah jual dikeluarkan.

Bertarikh pada 27 Januari 1999.

Sgd.
...
Peguamcara bagi
Pemegang Gadaian
Azhar & Wong
No. 7D, 4th Floor,
Jalan Medan Tuanku,
50300 Kuala Lumpur.

It is also important to reproduce s. 254 of the NLC. The said section reads as follows:

> 254 (1) Where, in the case of any charge, any such breach of agreement as is mentioned in sub-section (1) of section 253 has been continued for a period of at least one month or such alternative period as may be specified in the charge, the chargee may serve on the chargor a notice in Form 16D –
>
> (a) specifying the breach in question;
>
> (b) requiring it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in the charge;
>
> (c) warning the chargor that, if the notice is not complied with, he will take proceedings to obtain an order for sale.
>
> (2) Where, after the service of any such notice, the charged land or lease becomes vested in any other person or body, the notice shall be as valid and effectual against that person or body as it was against the person or body on whom it was served.
>
> (3) If at the expiry of the period specified in any such notice the breach in question has not been remedied –
>
> (a) the whole sum secured by the charge shall (if it has not already done so) become due and payable to the chargee; and
>
> (b) the chargee may apply for an order for sale in accordance with the following provisions of this Chapter:
>
> Provided that paragraph (a) shall not apply to any charge to secure the payment of an annuity or other periodic sum.

It is obvious that the statutory notice as represented by the Form 16D has specified 7 days as the period of breach.

The Golden Rule Of Interpretation

I take the view that when s. 254(1) of the NLC stipulates that the period of breach ought to have been continued for a period of **at least** one month (emphasis provided), then the alternative period that may be specified in the

charge by the chargee bank must be a period greater than one month. It makes no sense for Parliament to specifically spell out that the period of breach ought to be for a period of at least one month, and then on the other hand seemingly to allow the chargee bank to arrogate to itself the right to abrogate the intention of Parliament by arbitrarily specifying a period far shorter than the one month specified. In this case, the chargor has been given only seven days. In fact the Court of Appeal very correctly stated in *Chong Kon Yon v. MBf Finance Bhd* [1997] 1 CLJ 7; [1997] 2 MLJ 333 that a court would not follow a construction of a statute that would cause great hardship to the general public where another interpretation was available. In this case, the defendant contends that since the parties had agreed to the seven days, then that agreement should prevail. Whilst there is no doubt that the parties had agreed to the seven days this court must look into the reason why Parliament had specifically stated that the period of default ought to be at least one month.

In my view the further period of time is given solely to enable the chargor a further opportunity to sort out his affairs and to look for an opportunity for a re-finance of the loan. It is logical therefore to conclude that the longer the time that is given to the chargor the better is his opportunity to protect his property from foreclosure. It does not make sense therefore to hold that whilst parties are free to contract to include a period other than the one month as stated in s. 254(1) it ought to mean that the chargee can stipulate a period of time shorter than one month. In construing the section as I have done, I am also giving full effect to art. 13(1) of the Federal Constitution that says that "no person shall be deprived of property save in accordance with law".

In fact in *Lim Phin Khian v. Kho Su Ming* [1996] 1 CLJ 529; [1996] 1 MLJ 1 the Federal Court held that where great inconvenience or injustice will follow as a result of requiring strict compliance with a statute, the courts will be disinclined to hold that the provision imposes an obligation even though it may be couched in mandatory terms. Again in *Soon Kong Meng & Anor v. Lee Thye & Ors* [1995] 4 CLJ 547; [1995] 3 MLJ 544 the Federal Court, in advocating the purposive approach held that the words in a statute ought to be construed in a sense in which they best harmonise with the subject of the statute and in which the object of the statute is to be obtained and that therefore the words used in a statute or document should be construed with the attainment of that object in mind. To my mind, no clearer authority is needed. The single most objective in giving the one month notice to the chargor is to enable him to buy time. By one fell stroke of the pen the chargee has cut short the statutorily given period of time. Freedom to bargain still remains. But that freedom must be exercised harmoniously with the sole purpose of attaining the object of the need to give the statutory notice. In *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Berhad & Ors* [1997] 3 CLJ 274; [1997] 2 MLJ 805, the Federal Court said in no uncertain terms that ss. 254-265 of the NLC not only conferred rights upon

the chargors but that they were designed "for their protection" and that such rights could not be waived nor could the chargor contract himself out of the NLC. Therefore it is also on high authority that I come to the conclusion that whilst the chargor can accept a period of time in excess of the one month default as his period of default, the chargor cannot contract himself out of the NLC which has specifically fixed the minimum period "of at least one month".

If I am to give a restricted interpretation to s. 254(1) as is urged upon me by the respondents then surely the legislature would have merely omitted that part of the provision which states "of at least one month" and would have merely said "continued for a period as is specified in the charge". Further the fact that the first option is for a period of at least one month clearly envisages that the alternative period must be in excess of that one month and nothing less. This court must look at the mischief which had to be cured and in addition this court will have to look at the cure provided.

Before I conclude I must deal with a case relied upon heavily by the defence and that was the Supreme Court's decision in *Citibank NA v. Jong Tze Khiok & Anor* [1993] 4 CLJ 325; [1993] 3 MLJ 449. This was a case where the court had to consider s. 148 of the Sarawak Land Code. The said section reads as follows:

> (1) If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the chargee may give to the chargor, his personal representatives or assigns notice in writing that the chargee will resort to all available remedies unless such default be remedied.
>
> (2) If the chargor fails to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court –
>
> …
>
> (c) for the sale of the charged land, and the court after hearing the evidence may make such order as in the circumstances seems just.
>
> (3) The notice under subsection (1) shall comply with the terms of the charge:
>
> Provided that, without prejudice to subsection (4) of section 145, if no period of notice for the purposes of this section is stipulated by the charge, not less than thirty days' notice shall be given.

The appellant gave the respondent 14 days' notice to remedy the default and upon the respondent's continued default, applied for an order for the sale of the land under s. 148(2)(c) of the Sarawak Land Code. The trial judge dismissed the application on the grounds that the appellant had not established that the respondent had defaulted in payment of the amount secured by the charge and that the notice to the defendant was not good because it gave 14

days and not 30 days to comply. I do not see how the respondents can rely on this case. The words of Jemuri Serjan CJ (Borneo) who delivered the judgment of the court, need no further amplification. This is what his Lordship said at p. 459:

> Obviously, one has to look at the terms of the charge to ascertain and determine the period of the notice since sub-s (3) provides that the notice shall comply with the terms of the charge. The relevant terms of the charge relating to notice is to be found in cl 2(1) already referred to above. The period of the notice was categorically and unequivocally stipulated to be 14 days, and, in the light of the clear provisions of sub-s (3) which was complied with in the instant case, such a notice could not but be valid, and by no stretch of the imagination or other reasonable process of interpretation could the section be interpreted to require the minimum period of 30 days. We do not perceive any reasons why, under the circumstances, it was incumbent upon the High Court to seek the aid of the proviso or the legislative history of the section to arrive at the correct construction of the subsection. Clearly, there is no ambiguity in the wording of s. 148(3) to justify any resort to aid to construction of the subsection. The proviso, being intended to operate or have the effect of excepting the main provision only where no period of the notice was stipulated in the charge, did not, therefore, apply in the instant case. In the result, the notice, in our view, was valid and effective for the purpose of sub-s. (2)(c). Any other construction to the provision of s. 148(3) would do violence to the clear and unambiguous language employed in the subsection and render it meaningless.

It is obvious therefore that in *Citibank NA* the legislature has clearly spelt out that the parties shall have the right to stipulate the period of time for compliance and if no such period of time was stipulated in the charge, only then would the proviso requiring that not less than 30 days' notice be given, would become effective. But that is not the situation in respect of the case before me.

In *Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd* [1988] 1 CLJ 8; [1988] 1 MLJ 257 the then Supreme Court had occasion to consider the provisions of s. 254(1) and s. 255 of the NLC. In that case the appellant had applied for the sale of certain lands belonging to the respondent to satisfy a certain sum due to them. The learned trial judge made an order for the sale of the charged lands by public auction under s. 257 of the NLC to satisfy the sum due with interest. For the purposes of considering the issue before me I need to only consider the cross appeal of the respondent against the order of sale made by the High Court. The respondent argued that the appellant had given a period of seven days only for settlement of the sum due by the specified date in its notice of default served on the respondent prior to applying to the court for an order for sale when s. 255 of the NLC prescribes a minimum period of one month to be provided for repayment of the principal sum secured by a registered charge. The appellant argued that the order for

sale was properly made by the learned judge and that they had complied with the relevant provision of the NLC. This is what Seah SCJ said at p. 259:

> The appellant appeared to have adopted the following procedure when they decided to recall the loan given to the respondent before resorting to the statutory remedies laid down by the National Land Code 1965. Firstly, the appellant instructed their solicitors to send a notice in writing to the respondent on September 4, 1985 demanding payment of the debit balance of $1,739,082.50 with interest thereon within seven days from date thereof, failing which legal proceedings would be commenced against them for recovery of the same. In making this demand, the appellant seemed to have acted under section 10.01(h) of the Article X of the Annexure attached to the registered charge which provides, *inter alia*, that the whole of the principal amount of the loan together with interest thereon shall become due and immediately payable on demand in writing within seven days –
>
> > (h) if MIMB decides in its sole and absolute discretion that the continuation of the loan would be likely be detrimental to its own position or otherwise undesirable or that its security hereunder is in jeopardy.
>
> Secondly, when the respondent failed to repay the sum demanded with interest within the prescribed period, they shall be deemed to commit a breach of the agreement and registered charge (see section 10.01(a)). And after the breach had continued for more than thirty days, the appellant's solicitors sent a statutory notice in Form 16D under section 254 of the National Land Code 1965 requiring the respondent to remedy the breach and to pay up the sum of $1,739,082.50 and interest lawfully due within seven days from date thereof, otherwise application would be made to the High Court for an order for sale of the charged lands.
>
> It is clear from the summary of the facts that when the appellant despatched the notice of demand dated September 4, 1985, they acted pursuant to section 10.01 of Article X of the Annexure attached to the registered charge and not under section 255 of the National Land Code 1965. It is equally clear from the statutory notice that it was issued under section 254 and not pursuant to section 255 of the Code. This ground therefore fails.

It would seem from a study of the reasoning of the then Supreme Court that emphasis was given to the notice of demand stipulating the seven days' default. The question that arises is, is there a need to give any notice other than the statutory notices provided by way of Forms 16D and 16E. This issue was not raised before the then Supreme Court which did not also have the full benefit of considering the arguments relating to the golden rule of interpretation of statutes.

Having considered all issues and cases I hereby grant an order in terms of prayer (i) of this application with costs.